IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 599 of 1989

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MANOJ BHOGILAL DAVE - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR BN DOCTOR for Appellant. MR NR TATIA for Appellant.
MS NANDINI JOSHI, APP for Opponent.

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 05/07/2006

ORAL JUDGMENT

This appeal has been preferred against the judgment and order of conviction and sentence dated 22nd

September,1989 passed by the City Session Court, Court No.22 at Ahmedabad in Sessions Case No.177 of 1988 for the offence punishable under section 493 of the Indian Penal Code, whereby the appellant has been sentenced to undergo rigorous imprisonment of 4 years and pay a fine of Rs.500/-, in default, further rigorous imprisonment of 3 months. The appellant-accused has been acquitted from the offence punishable under section 363 and 495 of the Indian Penal Code.

2. Learned counsel for the appellant submitted that no acquittal appeal has been preferred by the State against the acquittal of the appellant-accused for the offence punishable under section 363 and 495 of the Indian Penal Code.

3. The brief facts leading to the present appeal are under:

It is the case of the prosecution that the complainant was serving in the office of the appellant since 16th November,1986. Thereafter, the complainant had gone to Bhopal with the appellant and Jamilaben Fatehsinh PW-6 and her husband Fatehsinh on 7th March,1987. They reached Bhopal from Ahmedabad and stayed at a Guest House near station. The appellant had sent Jamilaben PW-6

and her husband at Ahmedabad from Vadodara and the complainant accompanied the appellant-accused upto Bhopal. They reached Bhopal at 5.00 p.m. on 8th March,1987. They stayed at Hotel “Capital”, Near India Book Stall at Bhopal. It is also the prosecution case that the complainant had gone with the appellant-accused because the appellant wanted to make recovery of Rs.2250/- approximately from India Book Stall at Bhopal, who had place the order to purchase books from appellant. The appellant was engaged in publishing a weekly. Thereafter, the appellant insisted for the marriage with the complainant on 10th March,1987. Affidavits were sworn, the marriage was solemnized with appellant, in the name of Kumarbhai Pandya as narrated by the complainant. Complainant further narrated that he was a bachelor and this is how the appellant deceived the complainant, who is not lawfully married to him, to believe that she is lawfully married to the present appellant, cohabited with him and had sexual intercourse with him and in that belief, thereafter, they came back to Ahmedabad. The complainant stayed in the Hotel at Ahmedabad. The appellant could not take her at his residence. After two days, she came at her parental house. Thereafter, parents of the complainant came to know that she had married to Kumarbhai Pandya. Then, she attended the office of the

present appellant, where one Meenaben came and asked her whether she got married with Kumarbhai Pandya? She replied “Yes”. From Meenaben, the complainant came to know that the appellant-accused was married, his wife was Meenaben and was having female child. All this was known to the complainant on 19th /20th March,1987. Thereafter, the complaint was filed in the Court on 1st May,1987, which was sent by Court for police investigation. Investigation was carried out and charge sheet was filed. Thereafter, the case was committed to the Sessions Court and on the basis of evidence on record, the appellant was acquitted of the offence punishable under section 363 and 495 of the Indian Penal Code, whereas the appellant has been convicted for the offence punishable under section 493 of the Indian Penal Code for rigorous imprisonment of 4 years and to pay a fine of Rs.500/-, in default, rigorous imprisonment of 3 months. No appeal has been preferred by the State against acquittal of the appellant for the offence punishable under section 363 and 495 of the Indian Penal Code.

4. Learned counsel for the appellant submitted that Learned Trial Court has not properly appreciated the omissions, contradictions and improvements made by the prosecution witnesses and has wrongly arrived at the

conclusion that the appellant has committed the offence punishable under section 493 of the Indian Penal Code.

5. Learned counsel for the appellant has read over in detail, the evidences including the depositions of the prosecution witnesses and pointed out that it is within the knowledge of the complainant that the appellant was residing in the adjacent house, where the office was situated. The complainant was also knowing the fact that the present appellant was married. The complainant was also knowing the real and correct name of the appellant. The complainant was serving since 16th November,1986 in the office of the present appellant. There was also an intercom facility between the house and the office of the appellant. The wife of the present appellant was also frequently attending the office. The office was only a one room office and a small baby child of the present appellant was also known to the complainant. This aspect of the matter has not been properly appreciated by the Trial Court and, therefore, has wrongly arrived at a conclusion that the appellant has been deceived the the complainant to believe that she has lawfully married to him. In fact, ignorance pleaded by the complainant about the knowledge of the marriage of the appellant has not

been even believed by the Trial Court in para-12 of the judgment delivered by the Trial Court. In no uncertain terms, the Trial Court has also arrived at a conclusion that the complainant namely Rakshaben was knowing about the prior marriage of the appellant-accused with Meenaben. Thus, the correct name of the present appellant was also known to the complainant. The correct marital status was also known to the complainant and, therefore, there was no question of suppressing any fact whatsoever for the appellant from the complainant. This aspect of the matter has not been appreciated by the Trial Court. Hence, the impugned judgment and order passed by the Trial Court deserves to be quashed and set aside.

6. Learned counsel for the appellant also read over the depositions of PW-2, PW 3, PW 5 and PW 6 along with other documentary evidence on record, and pointed out that the complainant was never deceived by the present appellant as she was already knowing both the important facts about the present appellant viz. correct name and marital status, and, therefore, the impugned order passed by the Trial Court deserves to be quashed and set aside. Learned advocate for the appellant has also relied upon the judgment delivered in the case of **State of Gujarat V/s. Batuk Hiralal Mehta reported in 1974 GLR 391**; in the

case of **Raghunath Padhy V/s. The State, reported in AIR 1957 ORISSA 198** as well as in the case of **Moideenkutty Haji and others V/s.Kunhikoya and others reported in AIR 1987 KERALA 184.**

7. Learned Additional Public Prosecutor for the respondent-State submitted that the conclusion arrived at by the Trial Court that the appellant had committed the offence punishable under section 493 of the Indian Penal Code is absolutely true and correct. On perusal of the the deposition of the prosecution witnesses, it is clear that the prosecution has proved beyond reasonable doubt that the appellant has deceived the complainant, who was not lawfully married to him to believe that she was lawfully married to the present appellant and have sexual intercourse with him in that belief, as per her deposition, the appellant has committed the offence punishable under section 493 of the Indian penal Code. The complainant was never knowing the fact that the appellant was a married person. It is the present appellant, who had taken the complainant to Bhopal, administered threat. After reaching Bhopal at 5.00 p.m. on 8th March,1987, the appellant obtained the signature of the complainant on an affidavit and proved that her marriage had taken place. Now, the complainant was a

lawful wife of the appellant and, therefore, compelled the complainant to cohabit and to have sexual intercourse with him. This act of the appellant constitutes an offence punishable under section 493 of the Indian Penal Code,1973.

8. Learned Additional Public Prosecutor further submitted that had there been knowledge to the complainant, as per deposition of PW-1 and PW 2, the complainant would not have allowed appellant to have sexual intercourse with her. But the appellant deceived her to believe that (with the help of the affidavit) marriage has been solemnized between the complainant and the present appellant. The complainant came to know for the first time on 19th March,1987 that the appellant was a married person with one Meenaben and thereafter, the appellant gave news item, which was published in the newspaper of 30th April,1987 about the marriage between the appellant and the complainant and, therefore, she was compelled to file complaint before Court on 1st May,1987. Otherwise she dies not want to file a complaint. It is also submitted by the Learned Additional Public Prosecutor that the appellant cannot rely upon the depositions of hostile witnesses namely PW 3 and PW 6 i.e. depositions of Meenaben and Jamilaben respectively.

Learned Additional Public Prosecutor has relied upon judgment delivered by the Apex Court in the case of **Parveen V/s. State of Haryana** reported in **1997 SCC (Cri) 63**, and has pointed out that on the basis of the depositions of hostile witnesses, the appellant cannot say that there was a knowledge with the complainant about previous marriage of the appellant. This aspect of the matter has been rightly appreciated by the Trial Court and, therefore, judgment and order of conviction and sentence passed by the Trial Court is absolutely in consonance with the depositions of prosecution witnesses and other evidences on record.

9. Having heard the learned counsel for both the sides and looking to the evidence on record of Sessions Case No.177 of 1988, the judgment and order of conviction dated 22nd September,1989 passed by the City Session Court No.22 at Ahmedabad in Sessions Case No.177 of 1988 for the offence punishable under section 493 of the Indian Penal Code, deserves to be quashed and set aside, mainly for the following facts and reasons:-

(i) Looking to the deposition of the complainant, PW-1 at Exh-5, it has been narrated in detail that the incident had taken place between 7th March,1987 to 20th

March,1987. It is also a fact on the record that the complainant was serving in the office of the appellant from 16th November,1986. If a close look is given to the deposition of PW-1, it is stated that the office of the present appellant was at Bungalow No.9, Damayanti Park Society, Nr.Vitthalnagar Civil Hospital, Shahibaug, Ahmedabad. It is narrated by her that office was having a small room than the room of the Trial Court. Thus, only in one small room, there was an office of the appellant. There was also an intercom facility in the said office, one end was the office and the another end was the residence of the appellant. It is also stated by PW-1-complainant that some persons were residing on the ground floor level. In the office, there only four persons were working, i.e. one complainant and three other persons. As per her deposition in para 15, services of two persons were brought to an end. There are only two employees left out, including the complainant. In such a small office, both areawise, and employeewise and though she was serving in the office of the appellant since 16th November,1986 and having intercom facility from office to the house, ignorance about the marital status of the appellant has been pleaded by the complainant. Surprisingly, it is submitted by the prosecution that if there had been knowledge with the complainant about

subsistence of the previous marriage of the appellant, the complainant would not have married the present appellant. This has not been believed by the Trial Court. In no uncertain terms and unequivocally, it has been pointed out in para-12 of the judgment by the Trial Court that the complainant was knowing the previous marriage of the appellant with Meenaben. Her ignorance has not been accepted by the Trial Court. Looking to the totality of the evidence from other prosecution witnesses and from the deposition of PW-1 complainant herself especially of para-7 of her deposition, in my opinion, this conclusion arrived at by the Trial Court is absolutely true and correct. From para-7, it seems that when she had gone to the office, Meenaben asked her, whether she married to Kumarbhai Pandya, she replied “Yes”. Though knowing the correct name of the appellant being an employee of the appellant, surprisingly she has not taken any objection for her marriage with Kumarbhai Pandya instead of Manoj Bhogilal Dave, which is the correct name of the appellant. Looking to aforesaid narration in her deposition coupled with the fact that she was married to Kumarbhai Pandya instead of Manoj Bhogilal Dave, creates reasonable doubt in the mind of the Court that there was no deceit by the present appellant and that no fact has been suppressed by the present appellant. What was known

to the complainant and what was within the knowledge of the complainant cannot be suppressed by the appellant and, therefore, the Trial Court has rightly come to the conclusion that she was not ignorant about the previous marriage of the present appellant and after arrived at this conclusion, an error has been committed by the Trial Court in convicting the appellant under section 493 of the Indian Penal Code. Observation made in para-12 have not been challenged by the prosecution by filing a Criminal Appeal for acquittal for the offence punishable under sections 363 and 495 of Indian Penal Code. Thus, once the Trial Court has come to the conclusion that the complainant was knowing about the previous marriage of the appellant, it cannot be said that the present appellant had by deceit caused the complainant to believe that she was lawfully married to him. This aspect of the matter has not been properly appreciated by the Trial Court. It appears from the evidence on record, deposition of PW-1 as well as from the other prosecution witnesses and the documentary evidences that she was knowing that the appellant was married to Meenaben and, therefore, it cannot be said that the complainant was deceived by the appellant to believe that she was lawfully married to the present appellant. Ignorantia juris no excusat. Ignorance of law is not excuse, once there was knowledge of

previous marriage, the complainant, cannot lawfully marry with appellant, as per Indian Penal Code; in view of these facts that it cannot be said that the complainant was deceived to believe that she was lawfully married to the present appellant because she was knowing that person with whom she is marrying is already married. More so when she had narrated about the affidavit of change of name. Though she was knowing that appellant is not Kumar Pandya, she married with appellant in the name of Kumar Pandya. This Court believe that the complainant was aware about the fact that the first marriage of appellant was subsisting, and, therefore, it cannot be said that it was the present appellant, who had deceived the complainant to believe that she was lawfully married to him. Once the complainant was knowing about the previous marriage, as per conclusion in para-12 of the judgment and looking to the deposition of the prosecution witnesses, there must be knowledge with the complainant that unless there is a divorce with Meenaben of the appellant, there cannot be a marriage with the complainant even otherwise also this is offence under Indian Penal Code. Thus, there was no question of deceit by the present appellant. This Court will presume that complainant knows Indian Penal Code. For some unknown reasons, which were never disclosed by the complainant, she has married to Kumarbhai Pandya,

knowing fully the name of the appellant was Manoj Bhogilal Dave. This is not a normal behavior of the complainant. She is Science graduate and was serving in the office of the appellant since 16th November,1986. Knowing the name of the present appellant, there was no reason for the complainant to get married to Kumarbhai Pandya, though he is the very same appellant. Looking to this behaviour of the complainant coupled with other facts as narrated in her deposition coupled with para-12 of the judgment, it is wrongly concluded by the Trial Court that the appellant has committed the offence under section 493 of the Indian Penal Code. The appellant has not deceived complainant. Looking to the evidence on record, the conclusion arrived at by the Trial Court as to the offence is absolutely erroneous and dehors the evidence on record.

(ii) If a further close look is given to the deposition of the prosecution witnesses, it appears that the complainant had gone to the office on 19th /20th March,1987, where Meenaben asked the complainant, whether she had married to Kumarbhai Pandya, she replied in the affirmative. She is not disclosing that she had married to her employer. In a small office of hardly two employees, where there was a small room of office,

having intercom facility. There was also usage of the intercom. This all reflects the fact that ignorance pleaded by the complainant as to the marital status of the appellant is not correct. On the contrary, as per the evidence on record, the prosecutrix was knowing everything about the appellant and also the fact that during the existence of first wife, the affidavit had no value so far as marriage is concerned. Once she knows about the subsistence of the marriage with the wife of the present appellant, it cannot be said that she was deceived to believe that she was lawfully married with the appellant.

(iii) There are several improvements in the deposition of PW-1. Several letters have not been referred in the complaint nor they were presented at the time of investigation, which have been referred in her deposition. Likewise, there are material improvements so far as behaviour of the present appellant is concerned, especially during night between 8th and 9th March,1987, which is referred in para-3 of deposition of PW-1. Likewise, there is improvement about facts of threats administered by the appellant what has narrated that in the complaint and what is referred in para-3 and 4 of the deposition of the PW-1 about threat is totally

different. It is also stated by the complainant in her deposition that without reading the contents, the affidavit, was sworn by her, but, on perusal of the deposition of PW-5 Sammudin, at Exh-29 who is Notary in Bhopal, he has stated that the contents were read over to her. Likewise, there were several omissions and contradictions. Even what is stated by PW-1 about attending the office immediately after 12th March,1987 has not been corroborated by deposition of PW-2, who is the father of the complainant. PW-2 namely Narhariprasad Pandya, father of the complainant has pointed out that on the very next day, the complainant had attended her office, whereas PW-1 has stated that after 12th March,2006, she stayed at Hotel in Ahmedabad and, thereafter, on the next day, she had gone to her parental house and thereafter, on 17th March,1987, she had gone to her office. PW-1 is saying that she stayed in a hotel at Ahmedabad, after coming from Bhopal and the father has said that on the same day, she came at parental house. Father of the complainant received phone on 12th March,2006 from Kumarbhai Pandya and father invited Kumarbhai Pandya at his residence. Thus, PW-2, father of the complainant knows that his daughter had gone with Manoj Bhogilal Dave. When he received telephone from Kumarbhai Pandya, father of the complainant invites

Kumarbhai Pandya at his residence. Thus, father of the complainant was also not surprised by this novice name. This also creates doubt as to the trustworthiness of the PW-1 in correct narration of facts. Likewise PW-1 was not surprised, as per para-7 of her deposition by name of Kumarbhai Pandya. Thus, looking to the totality of the evidences on record, I am of the opinion that the complainant was never deceived by the appellant to believe that she was lawfully married to him and, therefore, the judgment and order of conviction so far as it relates for the offence punishable under section 493 of the Indian Penal Code, is not based upon evidence on record and, therefore, the same deserves to be quashed and set aside.

10. As a cumulative effect of the aforesaid facts and reasons, this appeal is allowed. The judgment and order of conviction dated 22nd September,1989 in Sessions case no. 177 of 1988 passed by the City Session Court, Court no. 22, Ahmedabad for the offence punishable under section 493 of the Indian Penal Code is hereby set aside. The appellant-accused is acquitted for the offence punishable under section 493 of the Indian Penal Code.

(D.N.PATEL,J)

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